

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WILLIS R. MILLER)	
)	
Plaintiff,)	
)	
v.)	C.A. 08C-12-263
)	
STANLEY TAYLOR et al.)	
)	
Defendants.)	

ORDER

On this 19th day of August, 2010, upon consideration of Plaintiff's Application for Certification of an Interlocutory Appeal, Motion to Stay Pending Appeal, and Motion for Transcripts, it appears that:

1. On July 23, 2010, the Court granted Motions for Summary Judgment filed by Defendants, Ihuoma Chuks and Dr. Dale Rodgers, and State Defendants, Stan Taylor, Thomas Carroll, Karl Hazzard, Derek Doane, Elizabeth Burris, and David Pierce. On the same date, the Court denied as moot Plaintiff's Demand to Convene a Medical Malpractice Review Panel.¹

2. The Court found that because Plaintiff failed to file an affidavit of

¹ In addition to the two Motions argued at the July 23, 2010, hearing, Defendant Debbie Washington filed a Motion for Summary Judgment on August 16, 2010.

merit pursuant to 18 *Del. C.* § 6853, his Complaint was not viable as a matter of law and summary judgment must be granted to the moving Defendants.² As a result, Plaintiff's Demand to Convene a Medical Malpractice Review Panel was denied as moot. The Court noted in its oral ruling that without an underlying claim for medical malpractice, it could not convene a medical malpractice review panel.³ The Court also noted that Plaintiff's opportunity to file for an extension of time to file an affidavit of merit had expired.⁴

3. On August 5, 2010, Plaintiff filed the present Motions. On August 10, 2010, Defendants Chuks and Rodgers filed their Opposition to Plaintiff's Application for Certification of an Interlocutory Appeal.

4. Even without a motion for reargument properly filed under Delaware Superior Court Civil Rule 59(e), the Court still retains plenary power to "vacate, modify or set aside judgments or orders" where "reasonably necessary to ensure the proper administration of justice."⁵ In this case, the "proper administration of

² Hr'g Tr. 11 (July 23, 2010).

³ *Id.* at 8-9.

⁴ *Id.* at 7-8.

⁵ *State v. Guthman*, 619 A.2d 1175, 1178 (Del. 1993) ("It is a basic principle of jurisprudence that courts are generally afforded inherent powers to undertake whatever action is reasonably necessary to ensure the proper administration of justice."); *Tyndall v. Tyndall*, 214 A.2d 124, 125 (Del. 1965) (same).

justice” requires the Court to reverse its earlier decision denying Plaintiff’s Demand to Convene a Medical Malpractice Review Panel and granting Defendants’ Motions for Summary Judgment.

5. Plaintiff is correct in his assertion (raised for the first time in the Application *sub judice*) that no affidavit of merit is necessary because he filed a timely Demand to Convene a Medical Malpractice Review Panel under Delaware Superior Court Civil Rule 71.2. Rule 71.2(b) states, in pertinent part: “If a party files a motion for summary judgment, any other party that desires a malpractice review panel must file a demand to convene within 10 days after the filing of the opening brief in support of the motion for summary judgment”⁶ The first Motion for Summary Judgment was filed by Defendants Chuks and Rodgers on May 20, 2010. Plaintiff’s Demand to Convene a Medical Malpractice Review Panel was filed on May 28, 2010, well within the ten days allowed under Rule 71.2.⁷

6. 18 *Del. C.* § 6853(e) (“Section 6853(e)”) provides:

No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case

⁶ Super. Ct. Civ. R. 71.2(b).

⁷ *Id.* See also Hr’g Tr. 8 (noting that Plaintiff’s Demand was timely). Pursuant to the computation guidelines of Rule 6, Plaintiff had until June 3, 2010, to file his Demand.

and as to the causation of the alleged personal injury or death, except that such expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence⁸

Reading Section 6853(e) and Rule 71.2 together, the Court is satisfied that, where a timely demand to convene a medical malpractice review panel has been filed, as is the case here, no affidavit of merit is required under Section 6853.⁹ Plaintiff need not file an affidavit of merit under such circumstances because he need not engage an expert to proceed before the medical malpractice review panel is convened.¹⁰ If the medical malpractice review panel ultimately finds that no negligence occurred, summary judgment will be considered and likely granted as a result of Plaintiff's failure to comply with the expert witness requirements of Section 6853. On the other hand, if a panel ultimately finds that medical negligence did occur, summary judgment will be denied, at least as it relates to Plaintiff's failure to comply with the requirements of Section 6853.¹¹

⁸ 18 *Del. C.* § 6853(e).

⁹ Section 6853 (e)(1)-(3) sets forth three additional scenarios (none of which are applicable to the case *sub judice*) that give rise to a presumption of negligence on the part of a health care provider and excuse the obligation to file an affidavit of merit contemporaneously with the complaint.

¹⁰ 18 *Del. C.* § 6853(e).

¹¹ See Super. Ct. Civ. R. 71.2(d) (allowing party to submit finding of the medical malpractice review panel to the jury in lieu of an expert opinion).

7. The Court's July 23, 2010 Orders granting summary judgment and denying the Demand to Convene a Medical Malpractice Review Panel are hereby **VACATED** and Plaintiff's Demand to Convene a Medical Malpractice Review Panel is hereby **GRANTED**. Pursuant to the discretion afforded to the Court under Rule 71.2(b), all pending Motions for Summary Judgment are stayed pending the panel's decision and Plaintiff's Motion to Stay is, therefore, **GRANTED**. Based on the foregoing, Plaintiff's Application for Certification of an Interlocutory Appeal is **DENIED** as moot.

8. Exhibit C to Defendants Chuks and Rodgers' Opposition to Plaintiff's Application for Certification of an Interlocutory Appeal is a complete transcript from the July 23, 2010 hearing. As Plaintiff should have been served with a copy of Defendants Chuks and Rodgers' Opposition, including exhibits, and because his Application for Certification of Interlocutory Appeal has been denied, his Motion for Transcripts is **DENIED** as moot.

IT IS SO ORDERED.

Jan R. Jurden, Judge

c: Prothonotary – Original
James E. Drnec, Esquire
Ophelia M. Waters, Esquire
Mr. Willis R. Miller

